SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM 1971

No. 71-841

INDIANA HARBOR BELT RAILROAD COMPANY, et al.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF INDIANA and GEORGE B. LEE, etc., et al.,

Respondents.

BRIEF OF RESPONDENT GEORGE B. LEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Jurisdiction

Respondent agrees with the statement in the first paragraph on page 2 of the opinion under the heading "Jurisdiction", except that the petition for transfer to the Indiana Supreme Court was filed on December 22, 1970, as correctly shown by Appendix D.

Respondent agrees that petitioner is seeking to invoke the jurisdiction of this court under 28 U.S.C. § 1257(3). However, for the reasons set forth in Part 1 of the Argument section of this brief, respondent believes that such jurisdiction is not properly invoked in this case, and that the court is without jurisdiction to grant the petition.

Questions Presented

Respondent Lee does not agree that any of the three questions set forth under the heading "Questions Presented" (page 3 of petition) are in fact presented by this case, because the premises on which all such questions rest are incorrect. Respondent believes that the reviewing court did in fact pass on all questions of law necessary to a proper judicial review of the administrative agency's order, and that the court reviewed at least one question of law not necessary to the decision. Accordingly, respondent finds it impossible to present a separate statement of questions presented, believing as he does that in fact no questions are properly presented to the court by this petition.

Constitutional Provisions Involved

Respondent Lee agrees that the IHB is seeking to invoke the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as set forth on page 3 of the petition. However, respondent contends that no claim in fact is presented under either of such clauses.

Statement of the Case

Respondent Lee disagrees with the "Statement" section of the petition (pages 3-8) in the following particulars:

1. Respondent does not agree that "the controversy centered about the appropriate construction of the statutory term 'main line track' " (petition, page 5). The focus of the controversy was the determination of the question of ultimate fact whether the IHB did or did not have 25 miles of main line track, and therefore whether or not it was within the statutory exemption from the definition

of "carrier" in the Full Crew Law. Evidentiary facts were stipulated, and the Commission had to determine this ultimate fact by application of the statutory terminology to the evidentiary facts.

2. Respondent disagrees with petitioner's paraphrase of Findings 8 and 10 of the Commission as set forth in subparagraphs (b) and (c) on page 5 of the petition. The findings, set forth in Appendix A to the petition, were that the "segments of track over which *the IHB* operates trains through and between stations over track owned by other railroads . . . should be counted equally with segments of track over which *the IHB* operates trains through and between stations" which IHB-owned or leased, in order to determine "the applicability *to the IHB* of the Indiana Full Crew Law", including segments "used pursuant to trackage rights agreements between the IHB and other railroads" (emphasis supplied). The Commission made no finding or conclusion of law as to the segments to be counted in determining the main line track of "a railroad" or "a carrier" as stated in petitioner's paraphrase. This distinction is crucial to an understanding of the manner in which the Appellate Court treated the case on judicial review. Petitioner's failure to make this distinction underlies the basic misconception of its entire petition and the questions which it seeks to present.

3. The Appellate Court did not state, as indicated on page 5 of the petition, that the scope of its judicial review of the Commission's decision would be limited to the substantial evidence question. Because of the nature of the issues decided by the Commission, and the court's view of the Commission's proper area of expertise in interpreting the law, the court stated that "the only real issue" presented by the appeal was whether the decision was sup-

ported by "substantial evidence of probative value" (Appellate Court Opinion, petition page 12a).

4. Respondent denies the statements in the petition, pages 6-7, that the IHB ever contended in either its petition for rehearing before the Appellate Court, or petition for transfer and rehearing to the Indiana Supreme Court, that the Appellate Court had violated its rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Those questions were first raised in the petition for stay of mandate, as set forth on pages 6-7 of the petition for certiorari. The petitions for rehearing and transfer are set forth in full as Appendices C, D and E to the petition for certiorari. None of these three petitions contains the slightest reference to any federal constitutional question.

Argument

1. *The Court Has No Jurisdiction to Review This Case Under 28 U.S.C. § 1257 (3), for the Reason That IHB Failed to Raise its Alleged Federal Constitutional Questions in the State Courts*

The IHB seeks to present the question whether the decision of the Indiana Appellate Court deprived it of an alleged constitutional right to judicial review of questions of law determined by an administrative agency, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Assuming that the IHB's first opportunity to raise this issue was revealed after the Appellate Court handed down its decision, the IHB nevertheless has had three opportunities under state procedure to raise federal constitutional questions, and has declined to do so. The petitions filed in the Indiana Appellate and Supreme Courts, set forth in Appendices C, D and E of the certiorari petition, may be searched in vain for any hint of a federal constitutional question. In all those petitions, the IHB alleged only that certain decisions of the Indiana Supreme Court had not been followed with regard to the proper scope of review of determinations of an administrative agency, and that the Appellate Court had failed to decide a question of law which IHB claimed was presented by the record and the briefs. None of the briefs filed by the IHB in support of its various petitions even cited a federal decision, nor was any decision of the Indiana Supreme Court cited which discussed any question under the Fourteenth Amendment to the U.S. Constitution. In short, IHB has had ample opportunity on three separate occasions to raise any federal constitutional ques-

tions which it desired to raise, and has expressly refrained from doing so.

The decisions of this Court reveal an unbroken and consistent line of authorities supporting the conclusion that certiorari jurisdiction under 28 U.S.C. § 1257 is unavailable where a petitioner has failed to raise federal questions in the state courts and in accordance with state procedures. One of the most recent cases is *Cardinale v. Louisiana,* 394 U.S. 437 (1969), which involved a death sentence challenged on the ground that a statute requiring admission of confessions in their entirety was prejudicial and unconstitutional. The Court dismissed a petition for certiorari for lack of jurisdiction, upon a finding that the sole federal question had never been raised or passed on in the state courts (394 U.S. at p. 438):

> Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L. Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391, 9 L. Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat

311, 315, 4 L. Ed. 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, n. 7, 3 L. Ed. 2d 1280, 79 S. Ct. 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160-163, 89 L. Ed. 812, 817-819, 65 S. Ct. 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435, 84 L. Ed. 849, 851-852, 60 S. Ct. 670 (1940); Whitney v. California, 274 U.S. 357, 362-363, 71 L. Ed. 1095, 1100-1101, 45 S. Ct. 641 (1927); Dewey v. Des Moines, 173 U.S. 193 197-201, 43 L. Ed. 665, 667-668, 19 S. Ct. 379 (1899); Murdock v. City of Memphis, 20 Wall. 590, 22 L. Ed. 429 (1875).

Thus the Supreme Court is following the same rule under the present jurisdictional statute, 28 U.S.C. § 1257, as was applied in 1836 under Section 25 of the Judiciary Act of 1789, from which the present statute is derived. The jurisdictional basis for this decision is spelled out even more clearly in the dissenting opinion of Mr. Justice Harlan (dealing with an issue not considered by the majority opinion) in *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968):

> The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. Section 1257 of Title 28, which defines this court's certiorari jurisdiction, states: . . .
>
> Since the Pennsylvania Supreme Court did not advert in its majority opinion to the preemption issue, it is necessary to determine whether that question was "specially set up or claimed" within the meaning of Section 1257. In deciding that question, it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues. See, e. g., Beck v. Washington, 369 U.S. 541, 549-554, 8 L. Ed. 2d 98, 107-109, 82 S. Ct 955; Wolfe v. North Carolina, 364 U.S. 177, 195, 4 L.

Ed. 2d 1650, 1662, 80 S. Ct. 1482; John v. Paullin, 231 U.S. 583, 585, 58 L. Ed. 381, 382, 34 S. Ct. 178.

To the same effect, see:

Wilson v. Cook, 327 U.S. 474 (1946).

Bailey v. Anderson, 326 U.S. 203 (1945).

Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934).

Stern and Gressman, Supreme Court Practice (4th ed. 1969), § 3.27, p. 120.

The Indiana Supreme Court has consistently held that it will not consider grounds for transfer which were not presented to the Appellate court in the petition for rehearing.

Dorweiler v. Sinks, 238 Ind. 368, 151 N.E. 2d 142 (1958).

State Board of Tax Commissioners v. Stanley, 231 Ind. 338, 108 N.E. 2d 624 (1952).

Anselm v. Anselm, 226 Ind. 98, 78 N.E. 2d 31 (1948).

This Court has made clear in numerous decisions that such state rules of practice with regard to the time and procedure for raising federal questions for consideration must be followed, and that if such procedure is not followed the United States Supreme Court will not consider the issues not so raised. This is true whether the highest state court expressly refuses to decide the question for a procedural reason, or whether it is simply silent on the issue. Stern and Gressman, Supreme Court Practice, *supra,* p. 121.

One of the leading cases on this point is *Beck v. Washington*, 369 U.S. 541 (1962). Appellant sought to challenge in the Supreme Court as a denial of equal protection a Washington statute allowing a challenge to grand jurors only by persons in custody. In his assignment of errors in the Supreme Court of Washington appellant had alleged generally that the court erred in denying his challenge to the grand jury, and also that he had been denied due process under the Fourteenth Amendment by denial of his right to challenge the grand jury. 369 U.S. at p. 552, Note 4. The state court rules provided that no alleged error would be considered by the State Supreme Court unless definitely pointed out in the assignments of error. Because he had not specifically mentioned the Equal Protection Clause in his contentions and arguments below, this Court declined to consider his equal protection contentions.

In this case, neither the Indiana Appellate Court nor the Supreme Court was ever given the opportunity to consider and pass on any federal constitutional question, since no such question was suggested in any of the three petitions filed before final conclusion of the case in the state courts. Obviously, the IHB's present contentions regarding alleged due process and equal protection violations come as an afterthought solely for the purpose of presenting some colorable basis for filing a petition with this Court in order to delay the effective date of the mandate of the Public Service Commission which has now been affirmed with finality by the Appellate Court.

2. *Certiorari Should be Denied Because No Substantial Question is Raised Under Either the Due Process or Equal Protection Clause of the Fourteenth Amendment*

The only issue in this case from its inception has been, and is now, whether or not the IHB is a "carrier" as defined in Section 1(a) of the Indiana Full Crew Law, Burns' Ind. Stat. § 55-1326(a), and thereby required to assign a fireman to all its runs in the state of Indiana as required by the provisions of that law. All parties have agreed that this question would be determined solely by a finding whether or not the IHB is a railroad "whose main line track is 25 miles or less in length" and thereby within the exemption contained in the definition of the term "carrier." Obviously the resolution of this question involves questions of fact (i.e. the counting of the actual track mileage), questions of law (the meaning of the term "main line track"), and mixed questions of fact and law (determination of which track to include in the computation in light of the statutory direction to count only "main line track"). The Public Service Commission in its order specified the standards which it used in making its determination, and found that the IHB has more than 25 miles of main line track and therefore is a "carrier" subject to the law. That is the decision which has been subjected to judicial review, as provided by statute and Indiana court decisions, in the Appellate Court of Indiana and upon petition to transfer to the Indiana Supreme Court. It is solely a question of interpretation and application of a state statute.

A reading of the questions presented by the petition for certiorari, and their more elaborate statement in the petition for stay of mandate quoted on pages 6-7 of the petition for certiorari, makes apparent that the IHB has no federal constitutional issues of substance. The IHB simply seeks to cast the arguments which it has heretofore presented as questions of state law and procedure into the form and terminology of the Due Process and

Equal Protection Clauses of the Fourteenth Amendment. But an analysis of the points presented, and the statement of reasons why certiorari should be granted in this case, show that IHB is now seeking to force this case into a procrustean bed the contours of which it will not fit.

The cases and authorities cited by the IHB at pages 8-10 of its petition stand only for the proposition that judicial review of questions of law involved in the decision of an administrative agency must be afforded at some stage of the proceedings, under both the state and federal constitutions, at the instance of a party adversely affected and resisting enforcement of a legal obligation imposed by the agency. IHB has had a full judicial review of the Public Service Commission decision and order, in accordance with the procedure contemplated by the Public Service Commission Act (Burns' Ind. Stat. §54-443) and the constitutional requirements of judicial review of agency action which have been well established by the Indiana Supreme Court. It is not suggested that either the statutory or judicial standard of review is constitutionally deficient in the scope of judicial review afforded a decision of the Commission.

In the passage quoted at page 9 of the petition from the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States* 298 U.S. 38, 84 (1936), which opinion was concurred in by two other justices of this Court, Mr. Justice Brandeis was making the point that due process required only an opportunity to have a court pass upon whether or not the agency applied the correct rule of law in making its determination, and whether or not procedures required by law were followed. In this case no question of procedural irregularity has been raised, and it is clear that the Appellate

Court has determined in its opinion that the Public Service Commission did not apply an erroneous rule of law in making its finding with respect to the application of the Full Crew Law to the IHB.

The IHB supports its contention that the Appellate Court did not provide proper judicial review of the agency determination by taking out of context one sentence of the opinion (first sentence of second paragraph of opinion, first paragraph on page 12a of petition). The argument misconstrues the reasoning and the holding of the Appellate Court. When the opinion is read as a whole, it is clear that the Court did pass on the question whether the Commission followed and correctly applied the statutory standards in making its "critical finding" that "IHB had more than 25 miles of main line track within the meaning of the Indiana Full Crew Law" (second sentence of second paragraph of opinion, petition page 12a).

The error of the IHB lies in its failure to recognize that any determination of the length of a railroad's "main line track" for purposes of applying the Full Crew Law involves a mixed question of law and fact, including consideration of particular railroad terminology and the overall type of business and operational structure of the railroad in question. The Appellate Court properly recognized the commingling of legal and factual questions in any such determination, and held in essence that since the Public Service Commission is charged by statute with the duty to enforce the requirements of the Full Crew Law, and since the Legislature has not provided a detailed definition of what kinds of track should be counted in determining the length of any railroad's "main line track", the Commission must apply its administrative expertise to the particular facts, and its determination as to the IHB did

not exceed the proper scope of the expertise delegated to it under the law. Thus, in a case such as this, it is not possible to separate into independent, disconnected categories the dual question whether the administrative decision is "contrary to law" or unsupported by "substantial evidence of probative value." See in particular the key paragraph in the opinion printed as the fourth full paragraph on page 18a of the petition for certiorari.

The Appellate Court's decision here on the question of the scope of authority given to the Public Service Commission to further define and apply the statutory term "main line track" to the facts of a particular railroad's operations is closely analogous to the decision of this Court in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940), where this Court upheld the authority delegated to the National Bituminous Coal Commission to determine the proper application of the act to particular companies through a broad statutory definition of the term "bituminous coal." See 310 U.S. at pp. 399-400. Similarly, the Indiana Full Crew Law specifically delegates to the Public Service Commission the duty to enforce and apply the provisions of the act. Burns' Ind. Stat. §55-1335.

The Appellate Court's review was not a "meaningless exercise in this case since there was no disputed fact," as contended by petitioner (petition, page 10). Only the basic evidentiary data relevant to a determination of the application of the statute was undisputed. The entire case arose out of a dispute over the ultimate fact determined by the Commission, i.e. the length of the IHB's "main line track." When the opinion of the Appellate Court is read as a whole, it is evident that the Court did determine "whether there is a reasonable basis for the interpretation given by the administrative agency" and that the

Court did not purport to "restrict . . . its review to the sole question of whether there was any substantial evidence of probative value to support the Commission's determination" (petition, page 11). When the opinion is so understood, the IHB admits that it "would have no reason to claim its constitutional rights have been violated."

Even if we assume *arguendo* that the Appellate Court thought the only issue was consideration of whether there was substantial evidence to support the Commission's decision, such an assertion did not prevent the case from being considered for transfer by the Indiana Supreme Court, as asserted by petitioner on page 13. Appellate Rule 11, quoted in part on the same page of the petition, states as one of the grounds for transfer the failure of the Appellate Court to give a statement in writing on each substantial question arising on the record. Appellate Rule 11(B) (4)(c). Petitioner clearly presented this issue to the Supreme Court in its petition for transfer. Paragraph 8 of petition, reproduced at pp. 38a to 40a of the petition for certiorari.

Petitioner's equal protection argument is even less substantial than its due process contentions. Petitioner claims the Appellate Court decided (in the negative) the question raised by respondent union whether trackage outside Indiana should be counted in determining the length of the railroad's main line track, and failed to decide a question of law raised by IHB as to the criteria the Commission should utilize in selecting various segments of a railroad's trackage in order to count its "main line track." In fact, both questions were dealt with by the Court in their application to the facts of the particular case and not as abstract questions of law. But petitioner has demonstrated no prejudice even assuming that a difference in

the method of judicial treatment of such questions presents a question of constitutional dimensions, for it admits that the decision of the out-of-state trackage question "was not even necessary to an affirmance of the Commission's decision" (petition, page 12). This conclusion is clearly correct. It certainly strains the imagination to conceive of any way in which inclusion of unnecessary dicta in a reviewing court's opinion can violate a party's constitutional rights or deny him equal protection of the laws.

Respondent agrees with petitioner's statements in Part 2 of its "Reasons for Granting the Writ" (petition, pages 13-14) that the questions it seeks to present concerning the required scope of judicial review of administrative action are important and worthy of the consideration of this Court. The difficulty, of course, is that none of these questions actually is presented by this case. Indiana courts have been diligent in insisting upon a scope of judicial review of administrative action at least as broad as that advocated by Professor Davis, and such judicial review was obtained by the IHB in this case.

Conclusion

For the foregoing reasons, the petition for writ of certiorari to the Appellate Court of Indiana should be denied.

Respectfully submitted,

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